Supreme Court of the United States

OCTOBER TERM, 1936

No. 228

THE CHIPPEWA INDIANS OF MINNESOTA,

Appellants,

vs.

THE UNITED STATES,

THE RED LAKE BAND OF CHIPPEWA INDIANS OF MINNESOTA,

Intervenors.

BRIEF FOR THE RED LAKE BAND OF CHIPPEWA INDIANS OF MINNESOTA, INTERVENORS.

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BRIEF FOR THE RED LAKE BAND OF CHIPPEWA INDIANS OF MINNESOTA, INTERVENORS.

In the Court below the intervenors, The Red Lake Band of Chippewa Indians of Minnesota, joined with the defendant, The United States, in the contention that the plaintiffs are not entitled to recover.

The intervenors again take the same position.

The issue in which the intervenors are involved is that in the event of a recovery by the appellants herein from the United States, the defendant, it cannot recoup itself from any funds held by it belonging to said intervenors.

The Court below having decided, as a conclusion of law, that the plaintiffs, the Chippewa Indians of Minnesota, are not entitled to recover and having dismissed the petition of said plaintiffs, from which decision plaintiffs appeal to

this Court, the further question of recoupment against the intervenors by the defendant is not at this time before this Court. It is only in the event this Court reverses the lower Court and returns this case to it for further consideration that the issue between the defendant and the intervenors need be given any consideration.

Supporting the defendant's position we desire to call the Court's attention to certain very material facts.

I.

For more than two hundred years the Red Lake Indians, exclusive of all other bands of Chippewa Indians, have resided upon and occupied said reservation and have in each and every instance, except one, been recognized, conceded and considered to have been the exclusive owners of the possessory right to their reservation. This has always been their claim. No other Indian or tribe of Indians ever made any claim of any right therein, until this proceeding. The Courts, Congress and the several Departments of the Government are and always have been in agreement with the Red Lake Band. The one exception is the report of the Committee on Indian Affairs in the House of Representatives in returning to the House a bill, which, after it was amended in the House and rewritten in the Senate, finally became the Act of January 14, 1889.

II.

June 19th, 1860, an Act (12 Stat. 44, 59) provided for negotiations with the Red Lake Band of Indians for a cession of a part of their then reservation. Pursuant thereto a treaty was concluded on October 2, 1863, ratified with amendments and proclaimed May 6, 1864 (13 Stat. 667).

The land ceded by said treaty contained about 2,905,000 acres, was adjoining on the west to the now diminished reservation, and to the tract of land ceded by the Red Lake Indians under the Act of February 20, 1904 (33 Stat. 48), which latter session plaintiffs contend was not in accordance with the terms of the Act of 1889, and for which they now claim compensation.

No other Indians joined in the Treaty of 1863. The ownership of the lands ceded in 1863 was recognized to be in the Red Lake Indians. No claim was ever made for any distribution of the proceeds of the sale of that large territory. No change of ownership or of possession was made during the next twenty-six years.

Argument as to Statement Number Two:

If the Red Lake Indians owned their reservation in 1863 and continued to occupy the unceded part, exclusive of all other persons, they owned the diminished part in 1889. Indians have the unquestionable right to the lands they occupy until that right is extinguished by a voluntary cession to the Government.

Leavenworth, L. & G. R. R. Co. vs. U. S., 92 U. S. 733.
Cherokee Nation vs. Georgia, 5 Peters 1.
United States vs. Cook, 19 Wall. 591.
Minnesota vs. Hitchcock, 185 U. S. 373.
Lone Wolf vs. Hitchcock, 187 U. S. 553.
Ex Parte Moore, 221 Fed. 554.

In the Cook case, *supra*, this Court said that the Indian title was as sacred as the title of the United States to the fee.

III.

Appellants' title is grounded upon the Act of January 14, 1889, and agreements made with all the eleven bands of Chippewa Indians (page 25, appellants' brief). The Act of January 14, 1889, is definitely made the starting point, and the basis of all claimed rights (page 29, appellants' brief).

Argument as to Statement Number Three:

Certainly if the United States could by the passage of the Act of 1889 vest a title in the appellants to lands on the Red Lake Reservation, which they do not now contend belonged to them prior to the passage of that Act, the same Sovereign Power could, by the positive and explicit provisions of the Act of February 20, 1904, Art. 4 (Record, page 17), effectively determine that the same Red Lake Band of Indians are the sole and exclusive owners of the diminished reservation and entitled to all of the proceeds from the sale thereof to the United States, and such action of Congress is not open to judicial review.

Lone Wolf vs. Hitchcock, 187 U. S. 553.
Cherokee Nation vs. Hitchcock, 187 U. S. 295.
Choate vs. Tropp, 224 U. S. 665.
Tigen vs. Western Inv. Co., 221 U. S. 286.
U. S. vs. Kagama, 118 U. S. 375.

IV.

As late as May 18, 1928, in the Act of Congress authorizing the Red Lake Indians to intervene in this case, to make sure that none of the lands of the present diminished Red Lake Reservation could ever be taken from them as a result of this suit, Congress provided:

"That in no event shall any part of the land of the Red Lake Reservation be used in any way in payment thereof" (the Judgment) (Record 24).

V.

The Act of 1889 authorized the Commissioners to negotiate with the Red Lake Indians for a cession of so much of their reservation as in the judgment of the Commission is not required to make and fill allotments and shall not have been reserved by the Commissioners for said purpose. The amount of land reserved was left entirely to the discretion of the Commission. The Commissioners did reserve a tract of land as directed by said Act (Record, page 16). H. R. Ex. Doc., No. 247, 51st Congress, 1st Sess. Cong. Doc., Series 2747.

The Commissioners in negotiating that treaty with the Indians at Red Lake, told them:

Page 72. Bishop Marty: "We are only to reserve so much land for you, so that when your children grow up there will be plenty for all of you." "You are to have as much land as you can use, you and your children."

Page 75. "We do not say that the other Indians have a right on this reservation. I am afraid you may not have understood this word consolidation in its true meaning. It does not give the Indians of other lands any right here. It does not give you any right upon their property."

Page 85. "From all we know of the Government of the United States we are sure that what is promised to you will be carried out."

Page 84. Mr. Rice: "We have heard your proposition and we think we can perhaps change the lines so as to give you all you want, and very much more than you will have

use for—you, your children, grandchildren and great grandchildren."

The Indians said:

Page 72. May dway gon on ind: "I will never consent to the allotment plan. I wish to lay out a reservation here, where we can remain with our bands forever."

Page 73. "Another objection we have to the Act is the allotment part; that allotments should be made to us in severalty. We wish that any lands that we possess should be not only for our own benefit but for our posterity, our grandchildren hereafter."

Page 83. "We want the reservation we now select to last ourselves and our children forever."

Page 75. Nah guan a gwon abe: "Those on the other reservations have no interests on this reservation. The people you see here are the only ones who have an interest in this reservation. Whether it is large or whether it is small the value of this reservation is only for these people here."

Page 83. "Most of the land we select is valueless to the whites and to ourselves, but still we would like to keep it intact."

Page 84. Mays co co no yay: "The Red Lake Indians concede all to you—all the land that is worth anything, and that will bring any revenue; the rest we wish to retain for ourselves. The young men want it for their children who will also have children."

The Commissioners after leaving Red Lake immediately proceeded to White Earth and the following appears in the Council Proceedings at that point:

Page 100. Mr. Rice: "What was reserved of the Red Lake Reservation was reserved for the Red Lake Indians alone."

Page 109. Wob on ah quod (referring to a former agreement): "At the time I uttered these words, 'I shall not touch the pen for any consideration ceding lands which I have no right to cede'; and I have no right to cede any of the Red Lake lands."

Page 114. "But the agreement with the Red Lake Indians is that no others can go there, and if they have an overplus of lands which they wish to dispose of in the future, they will have the sole benefit of the sale of those lands, which will not go into the pool."

The Indians above quoted are chiefs and recognized leaders of the bands. They were the first to sign the agreements at Red Lake. They were:

May dway gon on ind
Nah guan a gwon abe
Mays co co no yay

Wob on ah quod was the head chief of the White Earth band.

Argument as to Number Five:

The Red Lake Indians certainly did not cede the lands that were reserved. The construction of the agreement must not be to their prejudice. How the words of the treaty were understood by these unlettered people rather than their technical meaning should form the rule of construction.

Cherokee Nation vs. U. S., supra.

U. S. vs. Kagama, 118 U. S. 375.

Worcester vs. Georgia, 6 Pet. 515.

United States vs. Winans, 198 U. S. 371.

Jones vs. Meehan, 175 U. S. 1.

VI.

Again in 1902 when the United States obtained the cession of land through Indian Inspector James McLaughlin he told the Red Lake Indians that they would never be required to take allotments, that the proceeds from that sale belonged to them and that the diminished reservation was theirs alone.

No allotments have ever been made on the Red Lake Reservation. By the Act of Congress of June 18, 1934, no allotments can ever be made.

VII.

Neither appellants nor appellee can successfully challenge the title of intervenors to the Red Lake Reservation because of the action of the legislative executive and judicial departments of the Government in dealing with the Chippewa Indians of Minnesota over a long period of time as shown by treaties, statutes, executive orders, departmental proceedings and judicial interpretations as follows:

A. By treaties.

1. Treaties with the Red Lake Indians of Minnesota in which it recognized the exclusive ownership of these Indians to certain lands, allowed them the proceeds therefrom, and did not recognize the right of the other Chippewa Indians of Minnesota to join in making the treaty or to share in the consideration.

a. Treaty of October 2, 1863 (13 Stat. 667) in which the Red Lake Indians ceded to the United States approximately eight million acres of land,

tract number 445, Royce's Cessions. This treaty, in effect, fixed the western boundary of the Red Lake Reservation.

b. Agreement of March 10, 1902 (F. 34, R. 99), in which the Red Lake Indians agreed to cede to the United States 256,152 acres of land.

2. Treaties with other bands of Chippewa Indians in Minnesota in which the United States recognized their ownership of lands, their right to cede same and to receive the consideration therefor to the exclusion of the Red Lake band.

a. Treaty of August 21, 1847 (9 Stat. 908), in which the Pillager bands ceded to the United States tract number 269, Royce's Cessions.

b. Treaty of September 30, 1854 (10 Stat. 1109), in which the Chippewa of Lake Superior and the Mississippi bands ceded to the United States tract number 332, Royce's Cessions, out of which was reserved two tracts for two of the Lake Superior bands (the Fond du Lac and the Grand Portage), tracts numbers 338 and 339, respectively.

c. Treaty of February 22, 1855 (10 Stat. 1165), in which the Chippewa of the Mississippi ceded to the United States tract number 357, Royce's Cessions, out of which there was set apart separate reservations for each of these six different bands, numbers 453, 454, 455, 456 and 457. By the same treaty three tracts within the boundaries of the cession were reserved for the Pillager and Lake Winnibigoshish bands. This

treaty, in effect, fixed the southern and eastern boundary of the Red Lake Reservation.

d. Treaty of May 7, 1864 (13 Stat. 693), in which the Chippewa of Mississippi with the Pillager and Lake Winnibigoshish bands ceded to the United States the six reservations set apart for them by the treaty of 1855, and in lieu thereof received tract number 507, Royce's Cessions.

e. The treaty of April 7, 1866 (14 Stat. 765), in which the Bois Forte Chippewa, one of the Lake Superior bands, ceded to the United States tract number 482, Royce's Cessions. Under the same treaty tracts numbers 483 and 484 were set apart for the Bois Forte band.

f. Treaty of March 19, 1867 (16 Stat. 719), in which the Chippewa of Mississippi ceded to the United States two tracts, numbers 507, designated number 507, Royce's Cessions, as a consideration for tracts numbers 508 and 509.

g. Treaty of March 3, 1873 (17 Stat. 539) in which the Mississippi band ceded to the United States tract number 542.

B. By Acts of Congress.

1. The Act of February 20, 1904, *supra*, in which Congress expressly provided that the Red Lake Indians should own the Red Lake Reservation exclusively. This is the statute presented under subdivision IV of this brief, and is sufficient in itself to estop the United States from denying the exclusive owner-

ship of the Red Lake Reservation by the Red Lake Indians, and, therefore, precludes a judgment in favor of the United States and against the Red Lake Indians.

2. The Act of October 1, 1890 (26 Stat. 660), wherein Congress authorized a railroad right-of-way through the Red Lake Reservation and directed the payment of the consideration to the Red Lake Indians only.

3. The Act of April 14, 1896 (29 Stat. 92), providing for the payment of damages for a railroad right-of-way through the Red Lake Reservation to the Red Lake Indians only, and requiring their consent before the Act became effective.

4. The Act of March 3, 1903, *supra*, authorizing a sale of the western portion of the Red Lake Reservation and providing for the payment of the proceeds to the Red Lake Indians only.

5. The Act of March 26, 1910 (36 Stat. 265), granting an extension of time for payment of installments due on sales of land under the Act of February 20, 1904.

6. The Act of February 16, 1911 (36 Stat. 913), providing for the sale of unsold lands ceded under the Act of February 20, 1904, and directing the payment of the proceeds to the Red Lake Indians only.

7. The Act of May 18, 1916 (39 Stat. 122), authorizing a sale of timber on the Red Lake Reservation and payment of the proceeds to the Red Lake Indians only.

8. The Act of May 25, 1918 (40 Stat. 561), appropriating moneys out of proceeds from sale of timber on the Red Lake Reservation for repayment of Red Lake Indian tribal funds.

9. The Act of February 21, 1921 (41 Stat. 1105), creating Red Lake drainage district and directing the payment of compensation for damages to the Red Lake Indians, only, and the payment of benefits out of the Red Lake tribal fund.

10. The Act of June 14, 1932 (47 Stat. 306), authorizing a per capita payment to the Red Lake Indians only from funds derived from timber sold from the Red Lake Reservation.

11. The Act of June 16, 1933, authorizing a per capita payment to the Red Lake Indians only from funds derived from timber sold from the Red Lake Reservation.

12. Numerous appropriation acts from June 30, 1919, to February 17, 1933 (F. 41, R. 108), in which Congress recognizes the exclusive ownership of the Red Lake Indians to the diminished Red Lake Reservation and the funds derived from the sale of lands and timber therefrom.

C. By executive orders.

1. Executive order of November 21, 1892, adding 2,982.64 acres of land to the Red Lake Reservation to correct an error resulting from a mutual mistake in the description of the cession by the Red Lake Indians to the United States under the Act of 1889, *supra*.

2. Executive order of October 29, 1873, setting apart as an addition to the Lake Winnibigoshish Reservation tract number 549, Royce's Cessions.

3. Executive order of November 4, 1873, setting apart as an addition to the Leech Lake Reservation tract number 550, Royce's Cessions.

4. Executive order of May 26, 1874, setting apart as an addition to the Leech Lake Reservation tract number 567, Royce's Cessions.

5. Executive order of March 18, 1879, setting apart as an addition to the White Earth Reservation tract number 610, in two parts, Royce's Cessions.

6. Executive order of July 13, 1883, restoring to the public domain tract number 610.

7. Executive order of December 20, 1881, setting apart as an addition to the Bois Forte Reservation tract number 629.

8. Executive order of June 30, 1883, setting apart for the Bois Forte Reservation tract number 484, Royce's Cessions.

D. By departmental action.

1. Letter of the Commissioner of Indian Affairs with report of the Secretary of the Interior to the President, January 25, 1886, stating:

> "They (Red Lake Indians) own and occupy an immense area of country north of White Earth, which has never been ceded to the United States; the Indians still retain all their original rights in the soil • • •" (F. 5, R. 67).

2. In a communication from the Commissioner of Indian Affairs to the Secretary of the Interior, February 11, 1887, the Commissioner said:

> "The land lying between and north of the boundaries of these two cessions was thus recognized as the country of the Red Lake and Pembina Indians (the latter merged with the former), to which these Indians have all the original rights of land occupancy attaching to unceded Indian lands". (F. 6, R. 68).

3. The Secretary of the Interior transmitted a report from the Commissioner of Indian Affairs to the President in accordance with a request dated January 3, 1889, in which the Commissioner said:

> "• • • None of the Indians in that state, except the Red Lake Indians, have any right, title or interest in the Red Lake Reservation • • •" (F. 7, R. 68).

4. The Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, on May 24, 1889, instructed the Commissioners acting under the Act of 1889 as follows:

> "It has not heretofore been claimed by anyone, and so far as the knowledge of this office extends, and certainly not by the Indians themselves, that the Red Lake Reservation is the common property of all the Chippewa Indians in Minnesota. None but the Red Lake and Pembina bands have ever claimed an interest in said Reservation, and said Indians have always been recognized and regarded as the sole owners by right of original land occupancy, the

lands having never been ceded to the United States" (F. 8, R. 68).

5. The statements and representations of the Commissioners to the Indians in the negotiations of the agreement of 1889 to the effect that the Red Lake Indians were the exclusive owners of the Red Lake Reservation and that the other Chippewa Indians of Minnesota own no interest therein (F. 18, R. 79-83).

The record is teeming with instances where the Department of the Interior maintained that the Red Lake Indians were the exclusive owners of the Red Lake Reservation, and such is the contention of the government in this case.

E. By decisions of the Supreme Court of the United States.

Minnesota vs. Hitchcock, 185 U. S. 373.

United States vs. Holt State Bank, 270 U. S. 49, 58.

Jones vs. Meehan, 175 U. S. 1.

United States vs. Forty-three Gallons of Whiskey, 93 U. S. 188.

United States vs. Mille Lacs Indians, 229 U. S. 498.

The Red Lake Indians are not seeking a judgment in this case, all they ask is that the United States continue to observe the agreement made with them in 1904 and consistently to pursue its long established policy in dealing with them and their affairs. The fund held in trust for them by the United States came from the sale of a part of the home where they had lived since the earliest history of Minnesota and long prior thereto.

The Red Lake Indians vigorously contend that the plain-

tiffs in this suit are not entitled to any judgment because of any fault, misconduct or wrongful or illegal act on their part; that if the plaintiffs are entitled to a judgment for any sum, it is because of some mistaken policy, or wrongful or illegal act on the part of the United States for which the Red Lake Indians are not responsible; and that should any judgment be rendered for the plaintiffs and against the United States, no part thereof can legally, equitably or justly be charged to them or paid with their funds held in trust for them by the United States.

Respectfully submitted,

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